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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	
Plaintiff-Respondent,)	NO. 40076
)	
v.)	ADA COUNTY NO. CR 2011-12350
)	
SYDNEY LORELEI NEAL,)	REPLY BRIEF
)	
Defendant-Appellant.)	

REPLY BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF ADA

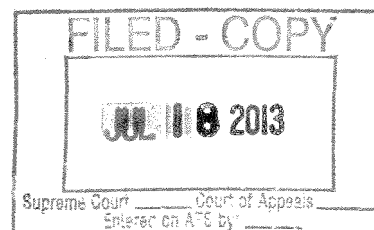
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STATEMENT OF THE CASE

Nature of the Case

This appeal presents several questions that appear to be issues of first impression in Idaho. Ms. Neal was convicted, following a conditional plea of guilty, of one count of possession of a controlled substance under Idaho Code § 37-2732(c).

Ms. Neal was charged with possession of methadone because she gave birth to a child whose umbilical cord blood tested positive for methadone. Ms. Neal asserts that probable cause did not exist for the court to find that she “possessed” a controlled substance where the only evidence of the substance was a positive blood test, and that the presence of a controlled substance in the umbilical cord blood of her newborn baby does not establish probable cause for a charge of possession of a controlled substance against her.

Statement of the Facts and Course of Proceedings

The statement of the facts and course of proceedings were previously articulated in Ms. Neal’s Appellant’s Brief. They need not be repeated in this Reply Brief, but are incorporated herein by reference thereto.

ISSUE

Did the district court err by denying Ms. Neal's motion to dismiss?

ARGUMENT

The District Court Erred When It Denied Ms. Neal's Motion To Dismiss The State's Information Due To A Lack Of Probable Cause To Support The Offense Charged

A. Introduction

Ms. Neal asserts that the district court erred in denying her motion to dismiss the State's information based upon the failure of the State to establish probable cause for every element of the charged offense. Specifically, the State failed to establish that Ms. Neal had knowledge of, and exercised dominion and control over, the methadone found in her newborn's umbilical cord blood.

B. The District Court Erred When It Denied Ms. Neal's Motion To Dismiss The State's Information Due To A Lack Of Probable Cause

In this case, the State, in both its initial criminal complaint and its Information, charged Ms. Neal with felony possession of a controlled substance pursuant to I.C. § 37-2732(c). (R., pp.5-6, 25-26.) The relevant portion of this statutory provision provides that:

It is unlawful for any person to possess a controlled substance unless the substance was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of his professional practice, or except as otherwise authorized by this chapter.

Idaho Code § 37-2732(c). Possession of a controlled substance is a general intent crime requiring that the defendant knowingly possess the substance. *State v. Stefani*, 142 Idaho 698, 704 (2005); *State v. Blake*, 133 Idaho 237, 240 (1999); *State v. Fox*, 124 Idaho 924, 926 (1993). The Idaho Court of Appeals in *Stefani* noted that, "[t]he purpose

of the intent element in the definition of a possession offense is to separate innocent, accidental, or inadvertent conduct from criminal behavior.”¹ *Stefani*, 142 Idaho at 704.

Here, there was insufficient evidence to support a finding of probable cause for the offense of possession of a controlled substance under I.C. § 37-2732(c). At a preliminary hearing, the state is required to present evidence “upon every material element of the offense charged.” I.C.R. 5.1(b). The state presents its theory of the charge, both through argument and by the complaint filed, and then the magistrate examines the charge from the state, along with the evidence presented, to determine whether “a public offense has been committed and [if] there is probable or sufficient cause to believe that the defendant committed such offense.” I.C.R. 5.1(b); *State v. McLellan*, 154 Idaho 77, ____ , 294 P.3d 203, 205 (Ct. App. 2013). There is no requirement that the magistrate search the record and the law to find alternate theories of the case for the state to proceed under. *McLellan*, 294 P.3d at 205. “The duty to proffer theories of a case under which the state wishes to proceed rests solely with the state, as it possesses the power to bring and subsequently seek to amend and prosecute charges.” *Id.*

The State concedes that its charging documents allege constructive possession, but claims that, under *McLellan*, such did not foreclose the magistrate from finding sufficient evidence that Ms. Neal actually possessed the methadone. (Respondent’s Brief, pp.7-8) (emphasis added).) However, the State forgets that the magistrate did not rely on the alternate theory that Ms. Neal actually physically possessed the methadone.

¹ There the Court was specifically discussing cases in which the defendant mistakenly believed he was in possession of a different, but still illegal, controlled substance. *Stefani*, 142 Idaho at 704. Such is not the case here.

The magistrate simply found that “the State has presented sufficient evidence to the court to believe that Ms. Neal possessed a controlled substance and that she is the individual who possessed it” and bound Ms. Neal’s case over to the district court. (11/17/11 Tr., p.14, Ls.14-18.) Notably, the magistrate court did not state that it was finding probable cause based on any alternative theory not posited by the State.

Further, the State’s new theory that Ms. Neal actually possessed the methadone is being asserted for the first time on appeal, which is improper. *See State v. Medina*, 128 Idaho 19 (Ct. App. 1996) (an issue presented on appeal must have been properly framed and preserved in the lower court). This legal theory was not argued to the magistrate court below, nor did the State proffer this theory to the district court, and the State should be precluded from now asserting that Ms. Neal actually physically possessed the methadone.

1. Ms. Neal Neither Actually Nor Constructively Possessed Methadone

The State specifically alleged that Ms. Neal constructively possessed the methadone in its charging document. (R., pp.5-6, 25-26.) Although neither the magistrate court nor the district court specifically found that Ms. Neal actually physically possessed the methadone,² the State still attempts to backtrack on its charging documents and now asks this Court find that Ms. Neal actually physically possessed the methadone found in her baby’s cord blood; however, the State’s argument fails. Even if, as the State claims, actual versus constructive knowledge are entirely separate and distinct, the “knowledge that one is in possession of the substance” is still an essential

element of the offense of possession of a controlled substance. *Fox*, 124 Idaho at 926. Whether that knowledge is shown from actual possession (physical control over an item) or constructive possession (knowingly having control over the item), is not determinative in this case because Ms. Neal did not have the requisite knowledge or control. See *State v. Rozajewski*, 130 Idaho 644, 646 (Ct. App. 1997) (holding that jury instruction defining actual possession as requiring “that a person have direct physical control over a thing” and defining constructive possession as requiring “that a person knowingly have the right of control over a thing” fairly and accurately reflected the applicable law); see also *State v. Silva*, 134 Idaho 848, 855 (Ct. App. 2000) (holding that instructions mirrored those given in *Rozajewski* and, therefore, were not erroneous).

Because the State was unable to prove that Ms. Neal had knowledge of the presence of the methadone in the umbilical cord blood of B.N. and was also unable to prove that she had control over the contents of B.N.’s umbilical cord,³ it thus failed to establish the element of “possession” at the preliminary hearing and the district court erred in denying Ms. Neal’s motion to dismiss.

² In fact the district court specifically found that “no controlled substance was found on or near Ms. Neal.” (R., p.68.) This factual finding contradicts the new claim by the State that Ms. Neal was in actual possession of the controlled substance.

³ Ms. Neal’s Appellant’s Brief contains a discussion regarding the lack of dominion or control over the contents of one’s blood. *But c.f. State v. Rudd*, 856 P.2d 699 (Wash. Ct. App. 1993) (holding that evidence was sufficient to support finding that defendant possessed controlled substances where defendant ingested receptacle containing controlled substances and contents were not assimilated, but rather were still within the dominion and control of the defendant as receptacle could be retrieved or expelled from the body).

Additionally, the State fails to address the fact that the presence of methadone was never detected in Ms. Neal's blood.⁴ (Respondent's Brief, p.12, fn.3.) Perhaps the State is aware that this fact would certainly eviscerate its new argument, raised for the first time on appeal, that Ms. Neal actually physically possessed the methadone.

2. The District Court Applied The Incorrect Legal Standard

In its Order Denying Motion to Dismiss, the district court used the incorrect legal standard to find that Ms. Neal had the knowledge required to establish possession of a controlled substance. The district court ruled as follows:

Possession of a controlled substance under I.C. S 37-2732(c) is a general intent crime, which requires: (1) a finding that the defendant possessed a controlled substance, and (2) they knew, or should have known, that it was a controlled substance.

(R., pp.64-65, 68.) This is incorrect. The Idaho Supreme Court has previously ordered a new trial in a similar case where the jury relied upon an erroneous "knew or should have known" standard to establish the defendant's knowledge. *State v. Blake*, 133 Idaho 237, 240-241 (1999).

In *State v. Blake*, the Idaho Supreme Court held that the district court erred in giving jury instructions which stated that in order to find the defendant guilty of possession of a controlled substance the State must prove that he "knew or should have known" that the substance possessed was a controlled substance. 133 Idaho 237, 240-241 (1999). The Supreme Court held that this was error as it allowed the jury

⁴ Ms. Neal refers this Court to the arguments proffered in her Appellant's Brief for her discussion of the State's inability to establish any means by which Ms. Neal possessed a substance found in the umbilical cord blood of another person. (Appellant's Brief, pp.16-21.)

to convict the defendant using a negligence standard. *Id.* at 241. The Idaho Supreme Court vacated with instructions for a new trial. *Id.* at 243.

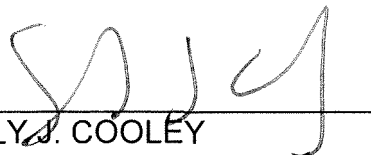
Here, the district court found that “the presence of methadone, in conjunction with her admission of not having a prescription, could properly indicate to a reasonable finder of fact that Ms. Neal, at least at some point, possessed methadone without a valid prescription. . . whether she knew or should have known she possessed methadone . . . [is one] question[] for the jury.” (R., p.68.) The district court applied the incorrect legal standard to establish the element of knowledge, thus the district court erroneously denied Ms. Neal’s motion to dismiss.

The State was unable to prove that Ms. Neal had knowledge of the presence of the methadone in the umbilical cord blood of B.N. and was also unable to prove that she had control over the contents of B.N.’s umbilical cord. Thus it failed to establish the element of “possession” at the preliminary hearing, and the district court erred in denying Ms. Neal’s motion to dismiss.

CONCLUSION

Ms. Neal respectfully requests that this Court reverse the district court’s Order denying Ms. Neal’s Motion To Dismiss and vacate her conviction.

DATED this 18th day of July, 2013.



SALLY J. COOLEY
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 18th day of July, 2013, I served a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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SJC/eas